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In the Supreme Court of the United States

OCTOBER TERM, 1979

INDIANA & MICHIGAN ELECTRIC COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 599 F. 2d 185. The Decision and Order of the National Labor Relations Board (Pet. App. 21a-51a) is reported at 229 N.L.R.B. 576. The Board's Supplemental Decision and Order (Pet. App. 16a-20a) is reported at 235 N.L.R.B. No. 159.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1979. A petition for rehearing was denied on July 11, 1979 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on October 5, 1979. The jurisdiction of this Court is invoked under 28 U.S. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by preventing certain employee members of the Union's collective-bargaining committee from participating in negotiating sessions outside their own bargaining units through denying them leave without pay for that purpose, while at the same time refusing to hold negotiating meetings during non-work hours.

STATUTE INVOLVED

Sections 8(a)(5), 8(d), and 9(a) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), 158(d), and 159(a), are set forth at page 3 of the petition for a writ of certiorari. Other relevant provisions of the Act are as follows:

> Section 7. Employees shall have the right to * * * bargain collectively through representatives of their own choosing * * *.
>
> Section 8(a). It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7 of the Act].

STATEMENT

1. Petitioner ("the Company"), an electric utility, and the Union[1] are parties to four collective bargaining agreements that separately cover Company employees in four bargaining units in Indiana and Michigan (Pet. App. 30a-31a).

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[1]Local 1392, International Brotherhood of Electrical Workers, AFL-CIO.

In the 1975-1976 collective-bargaining cycle, the four existing contracts expired on different dates between October 31 and December 31, 1975, and the parties set separate schedules for renewal negotiations in each of the units (Pet. App. 32a-33a). During the ensuing negotiations, the Union was represented by a single bargaining committee of 9 to 11 members. The committee consisted of the Union's business manager, a Union international representative, employee members of the unit to which the bargaining in question directly pertained, and approximately four employee members known as "travelers"—drawn from the other units (Pet. App. 17a, 33a-34a & n.5, 35a n.10). Some of the travelers were elected by the employees and other were appointed by the Union leadership (Tr. 146-148). In prior years, the Union had made limited use of travelers in collective negotiations (Pet. App. 34a & nn.6 & 7). In the 1975-1976 cycle, travelers participated without Company protest in the first four bargaining sessions—September 23, October 1, October 8, and October 9. The Company excused from work, but did not pay, any of the employee negotiators for the time spent attending or traveling to and from negotiations (Pet. App. 17a, 33a-35a & n.10).

At the conclusion of the October 9 session, the parties agreed upon 11 additional bargaining dates for the four units (Pet. App. 33a). Shortly thereafter, Lyle VanAman, a traveler who was a member of the Company's "trouble-shooter" service crew, requested 11 days' leave to participate in the scheduled bargaining sessions. Around October 21, the Company denied VanAman and the other travelers permission to take leave without pay in order to attend negotiations in units other than their own. The Company justified this action on the alleged

ground that such leave, particularly in the case of VanAman, would be burdensome to administer and that the Union's use of travelers was an attempt to effect Company-wide bargaining (Pet. App. 22a, 33a-35a).[2]

On October 29, 1975, the fifth bargaining session was aborted when the Company adhered to its position regarding travelers and the Union refused to proceed without their participation (Pet. App. 35a). On October 30, the Union filed the underlying unfair labor practice charge complaining of the Company's position on travelers (Pet. App. 36a).[3] At about the same time, the Union asked the Company for a negotiating meeting on the following Saturday, which was not a regular working day, or on any Saturday, Sunday, or evening when travelers would be able to attend (Pet. App. 37a n.13). On November 10, the Union followed up with a letter to the Company requesting negotiations outside normal working hours to permit the attendance of the union bargaining committee (Pet. App. 36a). On November 21, the Company responded with a letter rejecting the alternative proposal on the grounds that " 'it [would be] unreasonable, under the present circumstances, to ask

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[2]In 1971, after their petitions requesting establishment of a single Company-wide bargaining unit had been dismissed by the Board's Regional Office, the Union's predecessor locals, each representing a separate unit, merged into the Union. The Company agreed to recognize the Union so long as the separate identities of the bargaining units were maintained (Pet. App. 31a n.1).

[3]The Company also filed a charge contending that the use of travelers was an attempt to compel Company-wide bargaining; that charge was dismissed by the Board's Regional Office (Pet. App. 40a n.16).

members of the various company committees to devote their nights or weekends to negotiations' " (Pet. App. 37a).[4]

2. The Board, one member dissenting, held that the Company's refusal to grant travelers uncompensated leave to permit them to engage in bargaining during working hours, while simultaneously refusing the Union's request to bargain during nonworking hours, violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by interfering with the Union's right to select its own bargaining representatives (Pet. App. 22a-23a). Noting that the Company's principal defense was that VanAman could not be spared for an aggregate of 11 days, the Board pointed out that the Company was free either to deny the travelers' request for unpaid leave and grant the Union's request for bargaining outside working hours so that the travelers could participate or to grant the former request and deny the latter (*ibid.*). The violation, the Board held, resulted from the Company's simultaneous denial of both (Pet. App. 22a). As the Board explained, the Company "cannot have it both ways," where the result is to frustrate the employees' right to representatives of their own choosing (Pet. App. 23a).[5]

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[4]After the issuance of the instant unfair labor practice complaint on December 31, the Company agreed, without prejudice to its legal position, to excuse travelers from work to permit resumption of negotiations. In March, the parties concluded four separate contracts, one for each of the units (Pet. App. 36a, 39a-40a & n.17).

[5]In its supplemental decision the Board rejected the Company's affirmative defense that the use of travelers was an attempt to compel Company-wide bargaining. The Board stated that "[t]he presence of travellers was not inherently incompatible with four-unit bargaining," and concluded that the evidence did not establish that "acceding to one of the Union's alternative positions on the traveller issue necessarily would have forced bargaining beyond the scope of the recognized bargaining units * * *" (Pet. App. 19a).

3. The court of appeals upheld the Board's decision and enforced its order. The court agreed with the Board that the Company's conduct effectively denied the employees representation by their chosen negotiators; and it held that the Board properly concluded, on this record, that any "economic hardship or managerial disruption suffered by the Company" was outweighed by the employees' right to select whomever they wished to represent them in bargaining negotiations (Pet. App. 9a-10a). The court also agreed with the Board that the Union's insistence that the travelers participate in the negotiations did not amount to "a union forced company-wide bargaining situation" (Pet. App. 10a). Accordingly, the court held that "the Board's conclusions based upon the particular facts of this cause are supported by law" (Pet. App. 11a).

The court denied the Company's petition for en banc rehearing (Pet. App. 14a-15a).

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with the ruling of any other court. Further review is unwarranted.

The law is clear that employees and their designated bargaining representatives have the right, with rare exceptions, to select whomever they wish to represent them in bargaining negotiations. See, *e.g.*, *Minnesota Mining and Manufacturing Co.* v. *NLRB*, 415 F. 2d 174, 177-178 (8th Cir. 1969); *General Electric Co.* v. *NLRB*, 412 F. 2d 512, 516-517 (2d Cir. 1969); *NLRB* v. *David Buttrick Co.*, 399 F. 2d 505, 507 (1st Cir. 1968); *Standard Oil Co.* v. *NLRB*, 322 F. 2d 40, 44 (6th Cir. 1963). As the Second Circuit stated in *General Electric*, *supra*, 412 F. 2d at 517, the exceptions to this general

rule are "rare and confined to situations so infected with ill-will * * * or conflict of interest as to make good-faith bargaining impractical." The law is also clear that a union demand for a mixed-unit negotiating committee is not tantamount to an insistence on company-wide bargaining. *General Electric, supra*, 412 F. 2d at 517-520; *Minnesota Mining, supra*, 415 F. 2d at 178; *Standard Oil, supra*, 322 F. 2d at 44. The issue here, therefore, is whether the Board, upheld by the court of appeals, properly concluded that the Company did not establish a sufficient business justification to refuse to accede to either of the Union's requests to facilitate participation by the travelers and that the Company did not show that the Union's actual intent was to engage in Company-wide bargaining. Resolution of these issues turns on the particular facts of this case and raises no issue warranting consideration by this Court.[6]

There is no merit to the Company's contention (Pet. 10) that the Board's position amounts to a "*per se*" rule that precludes employers from bargaining about the conditions under which employees will be released from work to serve as negotiators or the circumstances under which bargaining during non-working hours can be conducted. The Board issued its order on a record that showed (1) that, as in most collective-bargaining situations, the Company could effectively control the

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[6]Regarding the business justification defense, the court of appeals noted (Pet. App. 10a) that "any economic hardship or managerial disruption suffered by the Company is manifestly less than that recognized by the Company from sick leave and vacation time for employees arrived at through collective bargaining." And with respect to the Company's assertions that the Union's position regarding the travelers masked an unlawful intent to compel Company-wide bargaining, the Board correctly found (Pet. App. 18a-19a) that the Company's charges were not borne out by the actual course of the 1975-1976 bargaining.

composition of the Union bargaining team by insisting on scheduling negotiations at times during which it refused to grant unpaid leave to certain of the selected bargaining representatives, (2) that prior to the issuance of the unfair labor practice complaint the Company had refused to agree to either procedure suggested by the Union for enabling the travelers to attend negotiating sessions (see page 5, note 4, *supra*), and (3) that the Company had not proposed any other solution for accommodating the Union's desire to have the travelers participate. Indeed, since it was the Company's position that participation by the travelers was an unlawful attempt by the Union to compel Company-wide bargaining, the question whether the Company was free to negotiate the terms of their participation was not presented.[7]

On this record, the Board's order is entirely reasonable. Under that order, the Company is free to bargain during working hours while granting unpaid leave to travelers, to bargain outside of working hours while refusing to grant such leave, or to use combinations of the two approaches. And the Company of course remains free to urge reasonable positions with regard to the duration or frequency of sessions held outside normal working hours and the number of non-unit employee negotiators granted leave. See, *e.g.*,

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[7]Thus, contrary to the Company's contention (Pet. 11), no conflict is presented with the Board's conclusion in *Axelson, Inc.*, 234 N.L.R.B. 414, 415-416 (1978), enforced, 599 F. 2d 91 (5th Cir. 1979), that payment of production wages lost to employee negotiators during bargaining is a mandatory subject of bargaining. In any event, the payment of wages to negotiators is obviously a different subject from an arrangement for employees to negotiate on unpaid leave time.

Concord Docu-Prep, Inc., 207 N.L.R.B. 981, 984 (1973); *Westinghouse Electric Corp.*, 132 N.L.R.B. 406, 407 & n.2 (1961).[8]

The reliance of the Company and amicus curiae Edison Electric Institute (Pet. 9-10; Amicus Br. 3) on *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), is equally unavailing. There the Court disapproved a Board order that required the employer to grant the union a collective-bargaining agreement clause providing for a checkoff even though the employer had not agreed to such a contractual provision in collective bargaining. Here, the Board's order does not require the employer to accede to any collective-bargaining clause, but merely to accommodate reasonably the Union's right to choose its negotiators.

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[8]The Board thus did not, as the Company suggests (Pet. 10), hold that employers must allow "unlimited numbers of employees off from work * * * to engage in unlimited numbers of * * * negotiations * * * in unlimited numbers of bargaining units * * *." The Union's request here involved four employees out of 700 represented by the Union, four bargaining units, and 11 negotiating sessions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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